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(19,801)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 47.

Office Supreme Court
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JAMES H. McKE

N. L. REARICK,
Plaintiff in Error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

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DEFENDANT IN ERROR.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

Our object in filing this reply is to examine the position assumed by the defendant in error with respect to one or two features of the case and especially to determine what bearing, if any, the cases cited have on the questions here involved.

The defendant in error reviews at length a number of liquor cases that have arisen in Pennsylvania (Brief, pp. 4-10), with the object of applying the rules there laid down to the present case. It will be observed that in all of those cases the commerce was the domestic commerce of Pennsylvania and had no relation to the subject of interstate commerce.

The cases referred to are wholly inapplicable to the questions here in controversy. Even though they were cases that effected interstate commerce, the rules there laid down would be at variance with the decisions of this court on the same subject, and they would therefore be of no value in determining the rule applicable to this case.

See the cases of

Caldwell v. North Carolina, 187 U. S., 622;
N. & W. R. R. Co. v. Sims, 191 U. S., 441; and
American Express Co. v. Iowa, 196 U. S., 133.

The defendant in error endeavors to establish the point that The Citizens' Wholesale Supply Company never extended credit to the purchasers of these goods, but retained title to the same until Rearick made the delivery, and collected the money therefor. It is claimed that the sale was for this reason made at the time of delivery and the transaction was therefore subject to the borough ordinance. This is a wholly unimportant question in this case, for this court has repeatedly held, that, the C. O. D. business, when the goods pass from one state for delivery in another, is interstate commerce.

In *The American Express Co. v. Iowa*, 196 U. S., 133, it was distinctly held that the transfer of the title to goods may be postponed until the delivery thereof and that the C. O. D. business as usually carried on is a proper and legitimate means by which commerce among the states may be transacted and is fully protected from the interference of local or state laws by the commerce clause of the constitution. The cases above cited have fully established this doctrine both where a private agent, as in the *Caldwell* case, *supra*, or a public agent as in the *American Express Co.* case, *supra*, is employed in the delivery.

It is claimed by the defendant in error that there was no mutuality of contract between the Citizens' Wholesale Supply Company and the purchasers of these goods in Sunbury and that therefore the sale took place when Rearick delivered the articles. (Brief, pp. 9 and 10.) The agreed statement of facts (Record, p. 28), shows that Kunkle, the agent of the Citizens' Wholesale Supply Company, solicited and took orders for the goods in Sunbury by exhibiting examples.

Were these orders not contracts for the sale of these goods, for goods which were then in another state?

The statement of facts in this case with reference to the soliciting of orders is almost identically like the facts in *Brennan v. Titusville*, 153 U. S., 289. Also see *Asher v. Texas*, 128 U. S., 129; *Stoutenburg v. Hennick*, 129 U. S., 140; *Caldwell v. North Carolina*, 187 U. S., 622; and other cases cited in our brief heretofore filed.

The defendant in error claims that the Citizens' Wholesale Supply Company never accepted the orders taken by Kunkle. What acceptance was necessary other than had been made by Kunkle when he took the orders as the agent of the company? If any other acceptance was necessary was there not such an acceptance when the company received the orders, packed the goods to fill the same, marked the boxes containing them and also each of the brooms with the name of the proper purchaser and shipped the boxes and brooms to Rearick, its agent at Sunbury, for delivery to the purchasers?

A strong effort is made by the defendant in error to bring this case within the rules laid down in such cases as *Austin v. Tennessee*, 179 U. S., 343, and *May & Co. v. New Orleans*, 178 U. S., 496. (Brief, pp. 12 and 14.) An examination of those cases will show that the rules there laid down have no

application to the present case. In the *Austin* case, *supra*, the facts were these: A manufacturer of cigarettes at Durham, N. C., piled a number of packages of cigarettes on the floor of its warehouse in Durham. These packages had no covering or inclosure of any kind around or about them. While so piled on the floor of the warehouse of the American Tobacco Company at Durham they were shipped to the defendant, Austin, in Monroe county, Tennessee. The Tobacco Company notified the "Southern Express Company to come and get them, and the said company, by its agent, took them, the said inclosed packages, and placed them in an open basket, already and heretofore in the possession of said Southern Express Company, and these packages were brought to the place of business of the defendant by an agent of said express company in the same open basket in which they had been placed by said express company at Durham, N. C., and by said agent lifted from said basket on to the counter in the place of business of defendant, and so delivered to and receipted for by defendant; that said basket was not left with defendant at all, but was carried away from defendant's place of business by said agent of said express company immediately upon the delivery of said packages of cigarettes; that defendant immediately upon his receipt of said packages, as aforesaid, put them on sale, without breaking, and sold one of them on November 1, 1897, to W. G. Brown, an adult resident of said Monroe county." Austin was convicted and fined for the sale of the cigarettes. This court by a divided vote sustained the conviction.

It will be seen how completely different are the facts in that case from those here. There the defendant received the cigarettes and placed them on sale and for making a sale was

prosecuted. In that case Austin was the importer of the cigarettes from another state. In the present case the purchasers were the importers. It was because of their contract with the Citizens' Wholesale Supply Company that these goods came into Pennsylvania. Rearick was completing the transportation. He stood in the same position as the agent of the express company who delivered the cigarettes in the Austin case. Rearick took the goods to the person who had purchased them while they were in the State of Ohio. Austin put the cigarettes upon his shelves and waited for buyers. When a buyer came he sold a package. It was for this sale that he was prosecuted. It is plainly apparent that there is an entirely different principle involved in the Austin case. This is further shown by the fact that in cases similar to this one, like the *Caldwell* case, *supra*, no notice whatever is taken of the Austin case in the opinions of this court. The case of *Vance v. Vandercook*, 170 U. S., 451, illustrates the distinction between the two cases. In that case this court held that the State of South Carolina could not prohibit the shipment from California of wines to residents of the former state on the orders of said residents for their own use, but that the state could prohibit sales of wines in the original packages after their arrival in South Carolina.

In *May & Co. v. New Orleans*, 178 U. S., 496, referred to by the defendant in error (Brief, pp. 12 and 14), the facts were that May & Co., located in New Orleans, had "ordered on their own account" from Europe various articles of merchandise. A portion of the goods May & Co. had themselves taken orders for and a portion was for stock. When these goods came to rest in May & Co.'s store in New Orleans they were taxed as other goods. It was claimed that the goods

were in the original packages of import and therefore not liable to the tax. The facts showed that the goods to fill the orders of May & Co.'s customers were sometimes packed to themselves and sometimes they were packed with May & Co.'s stock goods. When packed separately the separate packages were sent direct to the customer, when packed with stock goods the shipping package would be opened and the goods separated. The question was whether the manufacturer's package or the shipping package was the original package. This court held the shipping package to be the original package and that the breaking of the shipping package rendered the goods liable to a general tax. In that case May & Co. ordered the goods from Europe on their own account and not on the account of their customers. The goods were sold in Europe to May & Co. and shipped from Europe to May & Co. May & Co. were the importers of all the goods.

There is no similarity whatever between this case and the *May* case. This case is concerned solely with the transportation of merchandise. The Sunbury ordinance was a direct burden upon that transportation.

It is interesting to witness the efforts which the defendant in error makes to distinguish the present case from the *Robbins, Brennan, Caldwell* and other cases, *supra.* (Brief, pp. 15-18.) That there has been a complete failure of this effort is clearly apparent. It is claimed that in the Brennan case the goods were sent direct to the purchasers, thus showing that the sale took place in Chicago, and that the vender had extended credit in Chicago to the purchasers. How this conclusion could be drawn from that case is difficult to understand. There is nothing said in that case about extending credit and the goods may have been paid for in advance for all

that can be learned from the facts. If the argument of the defendant in error were to be believed there could be no interstate commerce unless the vender extended credit. The extension of credit is of no importance whatever as the many decisions of this court on the subject of interstate commerce testify.

The answer to the claim of the defendant in error that there is a distinction between this case and the Brennan case in that there the goods were sent direct to the purchasers, is to be found in the *Caldwell* case, *supra*.

In that case it was held, as we have pointed out in our brief heretofore filed, that the goods were sent direct to the purchasers and that the only distinction between it and the Brennan case was that the vender in the *Caldwell* case employed two agents instead of one in the delivery. The fact that Rearick received these goods at the freight station and completed the delivery does not in the slightest degree effect the question.

It is further claimed by the defendant in error that in the *Brennan* case and the *Caldwell* case, *supra,* the goods ordered were especially manufactured by the venders for each particular purchaser, which was not done in the present case. (Brief, pp. 16-18.) There is nothing in those cases either in the facts or the opinions, to warrant such conclusion. The decisions of this court in those cases did not turn on any imaginary facts. We have already conclusively answered this absurd argument in our brief already filed and further consideration of the subject is unnecessary.

It is claimed that there is a distinction between this case and the *Robbins, Brennan, Caldwell* and other cases, *supra,* in that in those cases the statutes or ordinances involved, each

"contained the fatal geographical discriminating clause." Just what is meant by this is not clear. Certain it is the statutes or ordinances involved in each of those cases made no discriminations whatever against goods from other states. In the *Robbins* case the State of Tennessee insisted that the statute did not discriminate in any way against drummers representing business houses located in other states, but that Tennessee and foreign drummers were taxed alike. This court held that that did not meet the difficulty, for interstate commerce could not be taxed by the state at all even though the tax be alike on state as well as interstate commerce. In not one of the cases above referred to did the decision turn on any question of discrimination.

The defendant in error claims that even though Rearick were engaged in interstate commerce it was permissible for the borough to require payment for the privilege of carrying it on. (Brief, pp. 19-25.) A number of cases on totally different questions are cited to support this contention. The cases of *American Steel and Wire Co. v. Speed,* 192 U. S., 518, and *Brown v. Huston,* 114 U. S., 622, cited by the defendant in error involved the question of whether a state could levy a tax on merchandise that has come to rest within its borders. This court held that a state could levy such tax. In such case the merchandise has reached its destination and become a part of the general mass of property in the state. It is entirely different from a case where the merchandise is still in transit.

Emert v. Missouri, 156 U. S., 296, also referred to by the defendant in error was a peddler's case. Emert peddled sewing machines through Missouri and sought to find purchasers for them. When he found a purchaser he would concurrently sell and deliver a machine. A different rule would apply in

such case from a case where orders are taken for goods which are in another state and which are subsequently sent from that state to fill the orders as was done here.

The cases of *Woodruff v. Parham*, 75 U. S., 123, and *Hinson v. Lott*, 75 U. S., 148, have no application here. In the former case the question involved was a license tax on indiscriminate auction sales. In the latter case this court held that when the same amount of tax is placed upon liquors manufactured within the state as is placed upon imported liquors the tax on imported liquors would be valid. It seems that this is the same rule that was applied in *Brown v. Huston*, and *American Steel & Wire Co. v. Speed*, *supra*. In other words, the imported liquors had come to rest.

It will be seen that none of the cases cited by the defendant in error on this subject has any application to a case like the present. On the other hand we have shown in our brief by a long and uninterrupted line of decisions that a state can not levy any tribute, without regard to the nature of the statute or ordinance imposing it, upon interstate commerce, of the character here involved, and that any attempt on the part of the state or its political subdivisions to regulate interstate commerce by the imposition of a license tax is void.

The defendant in error makes the claim that it is within the police powers of the borough to enforce the license tax here in question even as against interstate commerce and cites some cases that refer to the police powers of the states. An examination of each of those cases will show that this court has held in those very cases that the states can not use their police powers for the purpose of regulating commerce among the states. Especially is this true where the commerce is national in its character like the sale and transportation of goods.

We have discussed this subject fully in our brief and a further consideration of the subject here is unnecesary. We wish, however, to call the attention of the court to the following language used in the brief of the defendant in error. It is said at page 26 of the brief: "It is certainly within the same power" (the police power) "to enact laws to prevent, or at least regulate the domiciliary visitations of itinerant peddlers and canvassers who assail the privacy of domestic life and who have mostly to deal with innocent women and children, defrauding them of money and property and then fleeing to other states, leaving their victims without redress." The foregoing language was used by the Supreme Court of Pennsylvania in deciding *Titusville v. Brennan*, 143 Pa., 642, which decision was afterwards reversed by this court in *Brennan v. Titusville*, 153 U. S., 289. The same doctrine was urged upon this court in that case, but this court completely disregarded it.

It is claimed by the plaintiff in error that there is a distinction between a drummer who solicits orders from dealers and a canvasser who solicits orders from persons not dealers. A quotation is given from the opinion of a "learned court," but we are not informed as to the particular court, which holds there is such distinction. That, however, is not the doctrine of this court, for that was one of the questions involved in *Brennan v. Titusville, supra*, and this court held in the most positive manner that there was no such distinction. For this court to sustain the position of the defendant in error on this point would be to hold that only dealers could engage in interstate commerce and that persons not dealers would be obliged to make their sales to, and purchases from, other states subject to the laws of the states. It is certain that the commerce clause has been given no such narrow construction. The constitution

of the United States was not adopted to be enjoyed by any particular class or classes, but by all the people. The humblest citizen is as fully protected under that instrument as the greatest. All persons within the United States have the right to do interstate commerce free from the dictation of any state. The power to regulate that commerce, is, by the constitution, which is the supreme law of the land, vested exclusively in congress and any interference with the subject by the states is absolutely void.

We respectfully submit that the defendant in error has failed utterly to justify the decision of the court below in this case and that decision should be by this court reversed.

Respectfuly submitted,

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